IN THE HIGH COURT OF BOMBAY AT GOA

COMPANY PETITION NO. 19-F OF 2003

Fomento Resorts And
Hotels Ltd., a Public Ltd.
Company registered under
Companies Act 1956, with
its registered office at
Cidade de Goa, Vaiguinim
beach, Goa. Represented
by its Company Secretary
Mr. I. B. Muchandi, aged
55 years, married,
Resident of L-104,
Housing Board Colony,
Alto-Betim, Porvorim,
Goa-403 521. ... Petitioner

Mr. M. S. Usgaonkar, Senior Advocate with Mr. Sudesh Usgaonkar, Advocate for the Petitioner.

Mr. S. G. Dessai, Senior Advocate with Mr. M. S. Sonak, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 7TH JUNE, 2006.

J U D G M E N T

This petition is filed under Section 433(e) of the Companies Act, 1956 for the winding up of the Respondent-Company-M/s. Goa Golf Club Pvt. Ltd. on the ground that the Respondent is indebted to the petitioner-Company in the sum of Rs.19,73,535/- which the respondent has failed to pay to the petitioner inspite of the statutory notice dated 21-4-2003. The petition is resisted on the ground that the petition has been filed to exert pressure on the respondent to give in to the unreasonable and inconceivable demands made by the petitioner from time to time and it is the petitioner which is due and payable to the respondent a sum of Rs.5,14,406/-.

2. Some facts are required to be stated to dispose of the petition.

3. The petitioner owns a Five Star Resort known as Cidade de Goa. In terms of Section 13A of the Goa, Daman and Diu Public Gambling Act, 1976 a Casino i.e. games of electronic

amusement/slot machines can be run only in a Five Star Hotel. The respondent had specialized knowledge and expertise in running a Casino i.e. games of electronic amusement/slot machines, and the respondent's Director obtained a licence from the Government of Goa dated 15-2-1994. One Dr. William Britto is the Manging Director of the respondent-Company as well as of its sister concern namely Britto Amusement Pvt. Ltd.

4. By agreement dated 15-4-1995 the petitioner and the respondent agreed to set up a Casino in a place referred to as a "Hall" in Cidade de Goa Hotel in terms and conditions mentioned therein. This agreement was to commence from 1-9-1995 and to end on 31-8-2002 and could be renewed for a further period of 10 years and thereafter the respondent had a first right to extend the agreement on mutually acceptable terms and conditions. On or about 26-9-1997 the respondent renewed the Casino licence with additional machines valid from 26-9-1997 to 25-9-2002. The petitioner and the respondent modified the said agreement by another agreement dated 1-1-1999 and thereby modified the terms of the earlier agreement dated 15-4-1995. In terms of Clause 36 of the agreement dated

1-1-1999, the parties agreed that the respondent would shift the said Casino (games of electronic amusement/slot machines) to the premises owned or arranged by the respondent but leased to the petitioner and in any case not later than 31-3-2002 and further agreed that all the amounts mentioned in Clause 30 of the said agreement would not be required to be paid by the respondent from the date the respondent shifted the said Casino. The said sister concern of the respondent i.e. M/s Britto Amusements Pvt. Ltd. by registered Sale Deed dated 18-2-1999 purchased plot nos.184, 186 and 187 for a sum of Rs.32,64,750/- and a building has been constructed thereon named as "Chances" and the respondent on or about 14-9-2000 shifted the said Casino from the premises of the petitioner's hotel Cidade de Goa to the first floor of the said building known as "Chances". This shifting, as per the petitioner was in violation of the said Clause 36. On or about 8-3-2001 the respondent's Casino at the "Chances" came to be raided by the Police upon a complaint filed by the petitioner on the ground that the said Casino was being run in an unauthorised premises and on 28-3-2001 the Sub-Divisional Magistrate made a report that the

Casino was run in unauthorised premises i.e. outside the Five Star Hotel premises.

5. On or about 15-4-2001 the parties entered into another agreement under which the respondent was to pay to the petitioner a sum of Rs.2,50,000/- to run the said Casino. The said agreement was for a period of 11 months only and ended on 25-9-2002. Simultaneously, another agreement was executed between the petitioner and the respondent's sister concern namely Britto Amusements Pvt. Ltd. by which the said M/s. Britto Amusements Pvt. Ltd. licenced the first floor of the building known as "Chances" to the petitioner for a period of 11 months from 15-4-2001 to 14-3-2002 on payment of monthly compensation of Rs.50,000/- renewable for a further period from 15-3-2002 to 25-9-2002 on the same terms and conditions. The agreement dated 15-4-2001 between the parties which expired on 15-11-2002 was by virtue of another agreement dated 24-9-2002 extended till 15-11-2002 by stipulating that the existing arrangement with reference to the said Casino would continue till the ongoing negotiations were continued but however the fact remains that there has been no agreement

entered into between the parties in writing after 15-11-2002 though the petitioner contends that he put an end to the agreement dated 15-4-2001 between the parties on 31-3-2002.

6. The case of the petitioner is that under the second agreement(should be third) dated 15-4-2001 the respondent instead of conducting the operations in the Casino at Cidade de Goa as earlier agreed had to conduct the same in another premises, forming the extension of Cidade de Goa being premises taken by the petitioner on licence from Britto Amusement Pvt. Ltd. As per the petitioner, though the said agreement dated 15-4-2001 came to an end on the agreed date namely 25-9-2002 the same was renewed till 15-11-2002 but thereafter it was continued with the permission of the petitioner till 31-3-2003 and that the negotiations which were going on between the petitioner and the respondent did not materialise and as such on 31-3-2003 the contract between the petitioner and the respondent-Company came to an end. The petitioner states that the respondent and the petitioner exchanged correspondence during the said period which discloses that the respondent admitted its liability and agreed to settle the outstanding dues

and which is evidenced by Minutes of the Meeting dated 5-9-2001, letters dated 17-1-2003, 7-2-2003 and 17-2-2003 from the petitioner to the respondent and the letter dated 22-2-2003 from the respondent to the petitioner. Indeed, the letter dated 5-9-2001 shows that the petitioner was to start the construction of a bridge between Cidade de Goa and the Chances in three days and that the dues between the petitioner and the respondent had been reconciled and that over and above the agreed amount the respondent would pay interest at the rate of 18%, etc. The letter dated 17-1-2003 written to the respondent on behalf of the petitioner shows that a demand of Rs.19,41,496/- was made and it was further stated that no agreement would be signed unless the said payment was made. The same demand was reiterated in letter dated 7-2-2003. By letter dated 17-2-2003 the same demand was again reiterated. The letter dated 22-2-2003 written to the petitioner by the respondent shows that whatever was due to the petitioner would be paid simultaneously with the agreement to be signed. At the same time it was stated that the figures claimed by the petitioner were erroneous but that could be finalised after they got together.

7. The case of the petitioner further is that at the time of execution of the agreement dated 15-4-2001 the petitioner and the respondent had mutually worked out the dues payable by the respondent to the petitioner and the same were set out in Schedule II to the said agreement dated 15-4-2001 and the methodology of payment was mentioned in Clause V.1 thereof and thereafter the liability to pay interest amounting to Rs.7,23,890/- on account of delayed payment of monthly consideration for the period prior to 15-4-2001 was confirmed and acknowledged by the respondent vide his letter dated 8-7-2002. The petitioner has stated that the monthly compensation of Rs.2,50,000/- payable under the agreement dated 15-4-2001 was paid by the respondent upto June, 2002 and in terms of the said agreement dated 15-4-2001 the respondent had to pay interest at the rate of 18% for delay of payment of monthly consideration for a period upto 90 days and 21% for delay beyond 90 days. The petitioner stated that though in letter dated 8-7-2002 the outstanding due on account of interest was reduced to Rs.5,49,622/- on the ground that Ls.2000 were adjusted against the figure of Rs.7,23,890/-, such

adjustment was unwarranted and incorrect as is clear from subsequent letter dated 16-3-2003 from the respondent. The letter dated 8-7-2002 written as "without prejudice" by the respondent to Mr. Ambar Timblo shows that the interest calculated works out to Rs.7,23,890/-. It also makes a mention that the said Managing Director Dr. Britto had confirmed with him(Mr. Ambar Timblo) that Mr. Timblo owed Ls.2000 but since the matter was not settled the respondent had deducted that balance from interest due along with interest at the same rate thereby leaving a net payable amount to the petitioner of Rs.5,49,622/-. The petitioner, therefore, stated that the respondent-Company was due and payable to the petitioner a sum of Rs.7,23,890/- towards interest on delayed payment prior to 15-4-2001 and Rs.22,50,000/- towards monthly consideration for the months of July, 2002 to March, 2003, Rs.1,51,673/- towards interest payable on the said monthly compensation till 31-3-2003 and Rs.2,062/- towards liability on account of City Ledger. The petitioner seeks the winding up of the respondent for non payment of the said sum of Rs.19,73,535/- which, as per Annexure 1 to the petition is as follows:-

ANNEXURE 1 - AMOUNT PAYABLE TO FRHL AS ON 31/03/2003

A	**PAYABLE BY GGCPL TO FRHL**	
1	Interest due to FRHL under 1999 Agreement Admitted in letter 8.7.2002	723,890
2	Licence Fees payable under 15.4.2001 Agreement at the rate of Rs.250,000/- per month Licence fees from Jul-02 to 31-Mar-03	2,250,000
	TDS @ 21%	
3	Interest on delayed payment as per Clause IV.1.1 of the 15.4.2001 Agreement See Annexure - 2	151,673
4	City Ledger	2,062
	TOTAL PAYABLE BY GGCPL TO FRHL	3,127,625
B	**PAYABLE BY FRHL TO GGCPL**	
1	Discount Coupons from 12/10/02 to 27/3/03	139,090
2	Conference Hall hire charges	15,000
	TOTAL PAYABLE BY FRHL TO GGCPL	154,090
C	**NET PAYABLE BY GGCPL TO FRHL**	2,973,535
D	**DEPOSIT UNDER 15.4.2001 AGREEMENT ADJUSTED**	1,000,000
E	**BALANCE PAYABLE BY GGCPL TO FRHL**	1,973,535

8. On the other hand, it is the case of the respondent that the filing of this petition is an abuse of the process of the Court as the petitioner has been indulging in various pressure tactics to secure the eviction of the respondent from its present premises so that the license granted to the respondent for the operation of the Casino is withdrawn or revoked by the Government and the present petition is a step in that direction. The respondent has stated that the petitioner is well aware that the petitioner is liable to pay to the respondent a sum of Rs.5,14,806/-(now it is contended that it works out to Rs.574763/- which contention cannot be accepted) which amount has been arrived at after adjustment of certain amounts payable by the respondent to the petitioner and this position was made clear in response to the statutory notice, and that at any rate there exists a bona fide dispute with regard to the claims raised and filing of a winding up petition for the purpose of recovery of bona fide amounts is abuse of the process of the Court. The respondent has also stated that the petitioner has indulged in suppression of material particulars.

9. The respondent has stated that in utter breach of the agreement dated 15-4-1995, the petitioner proposed that the Casino be shifted to another portion of Hotel Cidade de Goa as the premises initially

allotted were required by the petitioner to be used for some other purpose. The respondent has stated that the petitioner being aware that the Casino can be installed only in a Five Star Hotel has chosen to exploit this position to the hilt, often by extracting from the respondent exorbitant amounts from time to time including by way of payments to be effected in foreign currency at London, where Dr. William Britto, the Managing Director of the respondent is primarily based and that the petitioner is also very much aware that the respondent has invested an amount of Rs.3,17,81,611/- as on 31-3-2003 towards the acquisition of the slot machines, etc. and in terms of the import license the respondent is precluded from exporting the same to overseas buyers and in view of the restrictions of gaming activities in most of the States in India there is remote possibility of securing any buyers for the purchase of the said machines and the petitioner is also aware that in the event, it creates a situation where the licence issued by the Government of Goa to the respondent is revoked, the respondent will have virtually no option but to offer the machines priced at approximately Rs.10,00,000/- to the petitioner at a throw away price or at least at a price that would be dictated by the petitioner in order to mitigate the losses which such an eventuality would obviously invite. The respondent has stated that the petitioner is bent upon creating such a situation which is evident from the false and contradictory complaints which the petitioner

has made to the Government of Goa from time to time, for the sole purpose of exerting undue pressure on the respondent and the complaints have been withdrawn no sooner the respondent on some occasions gave to the exorbitant and inconceivable financial demands made by the petitioner and the filing of the petition is yet another ploy to coerce the respondent to give in to the said exorbitant financial demands.

10. The respondent has stated that after complaints were filed by the petitioner a raid was conducted by the Government and a Show Cause Notice dated 9-5-2001 was issued to the respondent and after the Government was satisfied that there was functional integrality between the location of the Casino(at Chances) and the Five Star Hotel Cidade de Goa, the Show Cause Notice dated 9-5-2001 was discharged vide Order dated 16-1-2003 and that between the interregnum from 9-5-2001 and 16-1-2003, the respondent was constrained to approach the petitioner to clarify the position to the Government of Goa as it was the petitioner who had insisted upon the shifting of the Casino on the ground that the shifted premises would also be a part and parcel of the Five Star Hotel Cidade de Goa and initially the petitioner avoided to furnish any clarification or statement and thereafter the petitioner renewed exorbitant and inconceivable demands and the Managing Director of the petitioner and his

family began making visits out of the country insisting that Dr. William Britto settles their expenses abroad as he was a British National and this mode was probably adopted by the Managing Director of the petitioner in order to defraud the other share holders of the petitioner and the respondent was virtually forced to give in to the unreasonable and inconceivable demands and it is only thereafter that the petitioner furnished a written statement to the Government confirming that the Casino(at Chances) was operated in the premises licensed by the Five Star Hotel Cidade de Goa and that the petitioner had authorized the respondent to install the said Casino in terms of the license issued and there was complete functional integrality both in physical characteristic and legal documentation and it is only thereafter that the Order dated 16-1-2003 discharging the show cause notice dated 9-5-2001 came to be passed.

11. The respondent has stated that the petitioner made a false complaint on 8-4-2003 stating that the arrangements with the respondent ended on 31-3-2003 and this was again to coerce the respondent into giving in to unreasonable demands and at this time it was the demand that the sister concern M/s Britto Amusements Pvt. Ltd. sells the three said plots along with the buildings to the petitioner or in the alternative the said three plots along with the buildings situated thereon are given on a long term

lease to the petitioner and inspite of both the offers the petitioner was prepared to pay only a paltry amount and the Managing Director of the petitioner made it clear that in the event the respondent does not give in to the demands, every possible means would be employed to ensure that the licenses issued to the respondent under the Goa Public Gambling Act, 1976 would be revoked and as it was impossible to give in any further and that position having been made clear to both Mr. and Mrs. Anju Timblo, the complaint dated 8-4-2003 came to be lodged and further in order to create panic amongst the members of the public an advertisement on newspapers also came to be published stating that the petitioner would not be responsible to any person who might be gambling in the Casino (at Chances) and such persons would be doing so at their own risk and although the said complaint dated 8-4-2003 is suppressed by the petitioner copies of the advertisement have been annexed with the petition.

12. The respondent has stated that based on the said complaint dated 8-4-2003 the Government issued yet another notice dated 29-4-2003 to which the respondent filed its replies and the petitioner, as on previous occasions, recommenced pursuing its demands of exorbitant sums holding out that on this occasion also it would submit a written statement to the Government of Goa confirming the position that the Casino(at Chances)

was indeed located in the premises which formed part and parcel of Cidade de Goa Hotel and during the course of various meetings held, this position was made clear by the representatives of the petitioner including in particular Mr. and Mrs. Anju Timblo and in the course of the said meetings it was openly stated by the representative of the petitioner that no stone would be left unturned to ensure that the license would be cancelled and further that they would proceed to even file petition for the winding up of the Company and that Mr. and Mrs. Anju Timblo addressed communications to the Government urging for expeditious disposal of the show cause notice dated 29-4-2003 and that they be heard in the matter and in fact they were heard at the personal hearing in the chamber of the Hon'ble Chief Minister and thereafter by Order dated 28-10-2003 the said Show Cause Notice was dropped and the respondent was granted a license for a period of six months in order to enable the respondent to obtain a declaration to the effect that the licensed premises are part of the Five Star Hotel Cidade de Goa pursuant to the agreement entered into by the respondent with the petitioner. The respondent stated that although the statutory notice was addressed on 21-4-2003 for a period of almost seven months no petition for winding up of the Respondent-Company came to be filed and this is so because the petitioner was hopeful that pursuant to the show cause notice dated 29-4-2003 the Government would revoke the

license granted to the respondent for operating the Casino and only after the Order dated 28-10-2003 of the Government that the petition came to be filed on 27-11-2003 and, therefore, it is evident that this petition has been filed to exert pressure on the respondent to give in to the unreasonable and inconceivable demands from time to time and the filing of the petition is undoubtedly gross abuse of the process of the Court. The respondent has denied that the respondent is liable to pay to the petitioner a sum of Rs.19,73,535/- and that there is no existing liability on the part of the respondent towards the petitioner but on the contrary it is the petitioner who owes to the respondent a sum of Rs.5,14,800/- as on 25-9-2002. The respondent has stated that it was agreed that the calculations would be done upto 15-11-2002 pending the execution of a formal renewal agreement and, therefore, that could not be done upto 31-3-2003 and as such on 13-9-2002 representatives of the petitioner and the respondent had met at the Office of the petitioner and had agreed to execute a formal agreement and the terms were discussed and agreed upon and it was agreed in particular that lease would be granted to the petitioner only in respect of the area where the gaming was being carried out and the deposit would be in the form of a Bank Guarantee but the petitioner with a view to black mail the respondent deferred the execution of a formal agreement by offering flimsy excuses. The respondent has stated that the respondent is by

no means commercially insolvent and that the assets of the respondent as on 31-3-2003 is to the tune of Rs.3,10,96,310/- of plant and machinery, Rs.2,75,16,274/- of investment in the sister concern and Rs.76,05,548/- by way of loans and advances and other current assets and that the respondent has employed 35 employees all of whom along with their families are dependent upon the Company for the purpose of their livelihood and that its sister concern the said M/s Britto Amusements Pvt. Ltd. for the benefit of the respondent has recently undertaken an expansion programme by investing Rs.11,00,00,000/- and the petitioner has been bent upon in creating hurdles in the said extension plan. The respondent has stated that the petitioner has falsely stated that in the communication dated 18-10-2003 there was no annexure to the reply dated 13-5-2003 submitted in response to the notice for winding up petition dated 21-4-2003 and it is merely because the contents of the said annexure are inconvenient to the petitioner that ignorance is being feigned. The respondent has stated that the credits which were initially given were sought to be reversed on the ground that the same were erroneous and that such a volte face apart from being mala fide was for the purpose of avoiding adjustment on the basis of which it would be apparent that it is the petitioner who is due and payable at least Rs.5,14,806/- to the respondent and that the petitioner has deliberately suppressed the agreement between the petitioner and the said

M/s. Britto Amusements Pvt. Ltd. and as per the said agreement it is the petitioner who is due and payable to the respondent amounts by way of compensation/license fees and all throughout, such amounts were duly adjusted and the net amounts payable by or to the petitioner were worked out and the departure from this accounting system consistently followed, apart from being mala fide, establishes that the respondent is not due and payable to the petitioner any amount but it is rather the petitioner which is to pay to the respondent Rs.5,14,806/-. The respondent has stated that in terms of the agreement dated 15-4-2001 with M/s. Britto Amusements Pvt. Ltd., which agreement the petitioner has suppressed, it is the petitioner who is liable to pay compensation of Rs.50,000/- monthly and the said suppression is deliberate. As regards the communication dated 8-7-2002 upon which reliance is placed by the petitioner, the respondent has stated that it is deliberately misinterpreted and that in the first place there arises no question of placing reliance upon "without prejudice" communication dated 8-7-2002 and that at any rate upon adjustment of the said license fees it is apparent that no amount is due and payable by the Company to the petitioner. It is rather the petitioner who is liable to pay Rs.5,14,806/- to the respondent. The respondent has stated that Rs.1,47,673/- was deducted towards TDS to the Government and it was agreed that the balance amount of Rs.5,76.217/- would be adjusted by the petitioner towards the security

deposit of Rs.10,00,000/- given by the respondent to the petitioner. The respondent has placed reliance on the communication dated 9-10-2002 wherein it is stated that the petitioner was agreeable to adjust the respondent's outstanding dues from the security deposit. The respondent has stated that the monthly consideration of Rs.2,50,000/- after payment of TDS from July, 2002 to 15-11-2002 was to be adjusted towards the balance of security deposit, lease rent payable to M/s. Britto Amusements Pvt. Ltd. for the same period and the amounts owed to the respondent Managing Director by the Director of the petitioner for monies spent/advanced by the said Managing Director to the Directors of the petitioner. The respondent has stated that there was nothing incorrect in the adjustment of Ls.2000 (Rs.1,51,000) which amount was admittedly received by Shri Auduth Timblo for and on behalf of the petitioner and merely because Shri Auduth Timblo has not adjusted the said amount for reasons best known to him in the accounts of the petitioner, such adjustment becomes neither unwarranted nor incorrect. The respondent has stated that there is no denial with regard to the receipt of Ls.2000 in the U.K. and apart from the said amount of Ls.2000 another amount of Ls. 6650(Rs.5,02,075) was paid to the petitioner through Shri Auduth Timblo in the U.K. and the petitioner has deliberately avoided adjustment of the said amount and upon such adjustment being made, it is apparent that it is the petitioner who is due

and payable to the respondent Rs.5,14,806/-. The respondent has stated that since the letter dated 8-7-2002 was "without prejudice" there is no question of placing any reliance upon the same. The respondent has stated that the communication dated 16-3-2003 graphically describes the conduct of the petitioner and it records the insistence of Shri Amar Timblo that the land belonging to M/s. Britto Amusements Pvt. Ltd. be leased out in its entirety to the petitioner and the collateral pressure being exerted upon the respondent in that regard. As per the Respondent, Rs.5,14,806/- are payable by the Petitioner as follows:

STATEMENT OF CDG AS ON 31-3-2003

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1. <u>GGCPL TO CDG</u>

1.	Interest up to 31-3-2002	7,23,890		
	Less: TDS @ 20.4%	1,47,673	576217	
2.	License Fees from 1-7-02 to 15-11-02	11,25,000		
	Less: TDS @ 21%	2,36,250	888750	
3.	City Ledger		2062	1467029
	<u>2. CDG Ledger</u>			
1.	Discount Coupens		136010	
2.	Deposit to be adjusted		1000000	1136010

3. CDG TO BAPL

1.	Conference Hall rent for 3 days		15000	
2.	Lease rent from 1-7-02 to 15-11-03	225000		
	Less: TDS @ 21%	47250	177750	192750

4. CDG TO DR.W.P.BRITTO(DIRECTOR)

1.	Amount paid on behalf to Land Mark Hotel London on 8-6-99(6650 Pounds)		502075	
2.	Amount paid to Mr.Audhoot Timblo on behalf(2000 Pounds)		151000	653075
	Net Receivable			514806

13. The respondent has stated, in further affidavit dated 27-4-2004, that the wedding of Shri Ambar Timblo, the son of Mr. Auduth Timblo and Smt. Anju Timblo was held at Landmark Hotel in London on 28-6-1999 and at the request of the said Timblos the respondent's Managing Director Dr. William Britto made all arrangements on the understanding that the payments which would be made would be adjusted in the accounts of the respondent and its dealings with the petitioner and accordingly the said Managing Director deposited with the Landmark Hotel, London Ls.5650 by cheque and the total expenses of the wedding reception held on 28-6-1999 was Ls.5079.35 and with the consent of Shri Auduth and Shri Ambar Timblo a sum of Ls.570.65 was paid to the butlers, waiters, etc. and a sum of Ls.900 to 1000 was paid towards flowers, etc. with the

knowledge of the said Shri Auduth and Shri Ambar Timblo and inspite of solemn assurances that the petitioner has now made a volte face and has gone to the extent of denying receipt of the said amount. The respondent has produced the Invoice issued by the Landmark, London in the name of Chances, Cidade de Goa to support the said averments and has further stated that the respondent would be ready and willing to produce a statement from his Bankers in proof of the deposit made with Landmark Hotel, London. The respondent has stated that the said fact of receipt of Ls.2000 was reflected in the communication dated 8-7-2002, a communication on which the petitioner itself has placed reliance and there has been no communication denying the receipt of Ls.2000 and the denial has come for the first time in the affidavit in rejoinder which denial is patently false and mala fide. The respondent has stated that the petitioner has purported to include even the amount which have been deemed to have been received by the petitioner by way of TDS and at one stage the petitioner gave credits in respect of such payments but subsequently the petitioner made a volte face and stated that the credits were erroneously given. The respondent by another affidavit dated 6-8-2004 has stated that after the Order of the Government dated 28-10-2003 by which the show cause notice dated 29-4-2003 was dropped the respondent filed Special Civil Suit No.44/2004 on 27-4-2004 before the Court of C.J.S.D. at Panaji

praying therein that the agreement dated 1-1-1999 between the petitioner and the respondent is still subsisting and shall continue to subsist till the year 2012 and for further declaration that any other negotiations which may be construed to having culminated into any agreement subsequent to agreement dated 1-1-1999 are invalid, null and void and also for permanent injunction to restrain the petitioner from publishing on any magazines, newspapers, etc. to the effect that the relationship between the petitioner and the respondent has come to an end and also raising a claim against the petitioner in the sum of Rs.17,27,951/- with interest at the rate of 18% per year. The respondent has stated that the respondent filed along with the said Civil Suit a C.M.A. No.135/2004/B for temporary injunction and that the learned C.J.S.D. by his Order dated 31-7-2004 has been pleased to grant the said application for temporary injunction partially. The respondent has stated that there is a serious dispute between the respondent and the petitioner. In another affidavit dated 22-8-2005 the respondent has stated that the petitioner challenged the Order dated 31-7-2004 of the learned C.J.S.D., Panaji, before this Court in Appeal From Order No.54/2004 and this Court by Judgment/Order dated 23-6-2005 has been pleased to dismiss the appeal and further this Court was pleased to direct the respondent to deposit a sum of Rs.10,00,000/- which has been deposited and to continue depositing a recurring amount payable to the petitioner as per the

agreement and the same are being deposited by the respondent.

14. There is no dispute that an appeal filed by the petitioner against the said Order of this Court dated 23-6-2005 in Appeal From Order No.55/2004 has been dismissed by the Supreme Court and as on date and pursuant to the said Order of this Court dated 23-6-2005 the respondent has deposited a sum of Rs.20,60,327/- which according to the respondent, in any event is over and above the claim made by the petitioner of Rs.19,73,535/-, by about Rs.86,792/- apart from the fact that the respondent has claimed a sum of Rs.5,74,763/- in this petition and a claim for recovery of a sum of Rs.17,7,954/- has also been made in the said Civil Suit filed by the respondent against the petitioner.

15. Arguments have been heard from the learned Senior Counsel on behalf of both the parties. Notes of arguments have also been filed. Undisputedly, the respondent is a profit making Company whose worth is about Rs.6,62,18,132/- as stated on behalf of the respondent in para 22 of affidavit in reply dated 5-3-2004 and has consistently shown profits in the sum of Rs.69,03,553/-, Rs. 59,43,252/- and Rs.56,74,380/- for the last 3 years, ending with the year 2002-2003. The respondent also employs about 35 employees and their families are depending upon the respondent for the

purposes of their livelihood. It is contended on behalf of the petitioner that the petition is filed under Section 433(e) r/w Section 434(1)(a) of the Act and not under Section 433(e) r/w Section 434(1)(c) of the Act and that being the case the question of production of balance sheet and the question of solvency of the respondent Company does not arise. As per the petitioner when a petition is filed at the instance of a creditor under Section 433(e) r/w Section 434(1)(c) there is a specific requirement to be met, that the Court shall take into account the contingent and prospective liability of the Company and it is in such case the question of production of the balance sheet and status of solvency arises and the present petition is not under Section 434(1)(c) of the Act nor is there any averment in the petition that the respondent is insolvent and, therefore, is unable to pay the debt. As per the petitioner the question of taking into account the contingent and prospective liabilities of a Company equally does not arise in the third category of cases covered by Section 434(1)(b) of the Act and that this is a case where the Company is able to pay the debt but does not want to pay and this is because the claim of the petitioner is virtually admitted and it is not a case where the Company is unable to pay on account of commercial insolvency in which case that the requirement of Section 434(1)(c) has got to be satisfied. On behalf of the petitioner reliance is placed on the case of **C. Hariprasad** v. **Amalgamated Commercial Trader Pvt.Ltd.**(AIR 1964

Madras 519). It is submitted that the reliance placed by the respondent on the aspect of solvency and non production of the balance sheet by the petitioner is misconceived. The petitioner has also placed reliance on the case of **M. S. Madhusudan Gordhandas & Co.** v. **Madhu Woolen Industries Pvt. Ltd.**(1971(3) SCC 632)wherein at para 21 the Apex Court has held that where the debt is undisputed the Court will not act upon the defence that the Company has the ability to pay the debt but the Company chooses not to pay that particular debt and to a further observation of the Apex Court that even where the exact amount is not quantified it does not deter the grant of winding up. The petitioner contends that whether the respondent Company is commercially solvent or not is totally immaterial.

16. On the other hand, it is submitted on behalf of the respondent, that the expression "unable to pay its debt" has to be understood in the commercial sense, that is to say, the Court must clearly be satisfied that the current assets would be insufficient to meet the current liabilities. On behalf of the respondent, it is submitted that the distinction sought to be made out on behalf of the petitioner is devoid of merit and is against the principles laid down by the Apex Court in construing the expression "unable to pay its debt" appearing in Section 433(e) of the Act. On behalf of the respondent, it is submitted that the petitioner has ignored the law laid down by the

Supreme Court in respect of deeming provision contained in Section 434(1)(a) of the Act. Referring to **Mediquip Systems(P) Ltd.** v. **Proxima Medical Systems**((2005 7 SCC 42) it is submitted on behalf of the respondent that the Apex Court referring to the expression "unable to pay its debt" under Section 433(e) of the Act has categorically held that the said expression should be taken in the commercial sense and that the Apex Court has also referred to a decision of this Court in **Softsule Private Ltd.** ((1977) 47 Company Cases 438) wherein it was held that "if the debt is bona fide disputed, there cannot be "neglect to pay", within the meaning of Section 433(1)(a) of the Act(read Section 434(1)(a)). If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the Company is "unable to pay its debt is not substantiated". On behalf of the respondent, it is submitted that commercial insolvency would mean that the assets of the Company are such and its existing liabilities are such, as to make the Court feel clearly satisfied that current assets would be insufficient to meet the current liabilities. It is further submitted on behalf of the respondent that commercial insolvency has to be ascertained before arriving at a conclusion that a Company is unable to pay its debt and, therefore, it is mandatory that the balance sheet of the Company is annexed to the petition. As per the respondent the expression "unable to pay its debt" has to be co-related to the commercial solvency. The respondent considering

its financial position and status cannot be deemed to be unable to pay its debts and, therefore, what is stated in **C. Hariprasad** v. **Amalgamated Commercial Trader Pvt. Ltd.**(supra) to carve out a distinction in winding up petition under Section 433(e) r/w Section 434(1)(a) and a winding up petition under Section 433(e) r/w Section 434(1)(c) is superfluous, misconceived and has to be considered as a bad law being in direct conflict with the law laid down by the Apex Court.

17. In **C. Hariprasad** v. **A.C.T. Pvt. Ltd.** (supra), a Division Bench of Madras High Court stated that Section 433 of the Act declares the circumstances in which a Company may be wound up by the Court. Referring to Sub-Clauses (a) and (c) of Section 434(1) of the Act, the Division Bench observed that it would be seen that clauses (a) and (c) of Section 434(1) relate to two distinct matters. The first is a neglect to pay the dues of a creditor who has made a statutory demand; the second is a case where the Company is commercially insolvent. In the case of non-payment of a creditor inspite of the notice issued by him, as prescribed by Section 434(1)(a), the position, in the words of George Rankin, C. J. in **Japan Cotton Trading Company Limited** v. **Jajodia Cotton Mills Limited** (AIR 1927 Cal 625), will be:

"The effect of the statutory notice is that unless the debt is paid

within three weeks or some arrangement is made with the creditors, the Company is in the position of being conclusively estopped from denying that it is unable to pay its debts". The Division Bench further observed that the object of Section 434 is to create a fiction as to when a Company can be deemed to be unable to pay its debts. If the case comes within the scope of that fiction, it will not be open to the Company to say that in reality it is in a position to pay its debts. It would follow that in such a case it will really be unnecessary to inquire whether the Company is in fact solvent or not. Referring to the Full Bench Judgment reported in **Public Prosecutor** v. **Abdul Wahab**(AIR 1964 Mad 367) it observed that a Full Bench had considered the true scope of a statutory fiction and it was held that within the area of its operation such a fiction must be regarded as the reality. It will not be open to the party or the Court to contradict the fiction in regard to those cases where the statute intended it to apply. But at the same time a fiction cannot be extended to operate beyond the purpose for which it is intended. The Division Bench further observed that Sub-Clause(a) of Section 434(1) is distinct from Sub-Clause(c) which relates to a state of commercial insolvency. In the latter case, it will no doubt be open to the Court to find out, on a consideration of the value of existing assets and liabilities of the Company, whether it is really in insolvent circumstances. But in the former case no such investigation is called for; nor even can it be

undertaken. It will be sufficient for the purpose if there be a failure on the part of the Company to meet the demand in terms of the statute.

18. It is not really necessary to enter into the said controversy for the purpose of this petition. Suffice it to observe that Section 433 of the Act does not confer on any person an absolute right as such to seek an order that a Company shall be wound up. As the word "may" in the opening part of the Section 433 clearly indicates that even if the Company is unable to pay its debts, the Court must still exercise its discretion in deciding whether, in the circumstances of the case, it would be in the interest of justice to wind up a Company. In other words whether a Company should be wound up or not is a matter of discretion of the Company Court which is exercised ex debito justiciae. The Court will order winding up only in appropriate cases and when equity and justice so require, the winding up being a matter of discretion and in fact it is the last resort which the Court would resort to and certainly not the first, having regard to its impact and consequences which bring about closing down of a Company which is engaged in production of goods or services and thereby throw out of employment of numerous persons and which in turn causes hardships to the members of their families and not only that it also causes resultant loss of revenue to the State by way of collection of various taxes and also diminishing goods or

services. Inability to pay its debts although is a ground for winding up of a Company, the Court is certainly entitled to take into consideration, in determining whether a Company is unable to pay its debts, the contingent and prospective liabilities of the Company or in other words its financial status. A Court would be even justified in refusing to pass a winding up order in a case where it is shown that the Company is financially sound, even though it was refusing to pay the debt. The case of **Bangasri Ice and Cold Storage Ltd.** v. **Kali Charan Banerjee** (AIR 1962 Calcutta 613) on which reliance is placed on behalf of the petitioner, was a case under Section 433(e) and Section 434(1)(a) of the Act, like the case at hand, and, the Division Bench of that Court observed that under the provisions of Section 433(e) a Company may be wound up if it is unable to pay its debts. The object of liquidation of the Company is that the assets of the Company should be realized and the debts paid in accordance with law and as expeditiously as possible. But before a Company could be sent to liquidation, it must be "unable to pay its debts". This presupposes that there exists a debt and the Company is unable to pay it. Prima facie this must relate to the solvency of the Company. The word used is "unable" and not "unwilling". So far as the creditor is concerned, who cannot obtain payment of his debts, he is entitled, as between himself and the Company ex debito justitiae to an order for winding up, if he brings his case within the Act. But

he must first of all establish that there is a debt owing and secondly, must satisfy the Court that the Company is unable to pay the same. It has been said that he must show that the Company is "commercially insolvent" i.e. when it is unable to meet its current payments and its assets are not such as to meet the existing liabilities. The expression "commercially insolvent" has been defined by Sir William James V. C. in European Life Assurance Society, (1869) 9 Eq.122 at page 128, as - "not in any technical sense but plainly and commercially insolvent- that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain - as to make the Court feel satisfied - that the existing and probable assets would be insufficient to meet the existing liabilities". It is not always easy to establish to the satisfaction of the Court about the insolvency of a Company... although it is for this reason that Section 434 provides that where notice is given and the Company after the requisite period neglects to pay a debt, then there arises a presumption of inability to pay. But here again, the words used are "neglects to pay". In either case, that is to say, under Section 433 or Section 434, if the debt is disputed bona fide, then in that case there is neither inability nor negligence to pay. The meaning is quite clear. It will not do for a creditor merely to put forward a claim. The Company may not accept it or may dispute either its factum or validity. Where there is a genuine dispute of this description, it cannot be resolved by having recourse

to winding up proceedings. But, just as it will not do for a creditor merely to put forward a claim, it will not do for the Company to deny a claim recklessly. If the denial of the dispute is neither bona fide nor reasonable, then the Court does not lose its power of granting relief by passing a winding up order. The position in law with regard to disputed debts is, by no means, an easy one. It has however been admirably summed up in Palmer's "Companies Precedence" 17th Edition Part II at page 27. It is stated as follows:

> "The mere omission of a Company to comply with a notice requiring payment of a debt, served pursuant to the above para, is not "neglect" within the meaning of that paragraph if there is reasonable cause for the omission, and the fact that the debt in question is bona fide disputed is a reasonable cause. It is now well settled that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court, and should be dismissed with costs. But, of course, if it is shown that the alleged dispute is not a bona fide one, the objection to the petition fails. Thus, it is not uncommon for a Company, after again and again begging for time for payment of a debt, to spring on the petitioner, at the last moment, the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion, and meets with no favour from the Court".

19. As can be seen from **Mediquip Systems (P) Ltd.** v. **Proxima Medical System(**supra) the Apex Court has approved the view held by this Court in **Softsule (P) Ltd.**(supra) wherein this Court had observed that one of the considerations in order to determine whether the Company is able to pay its debts or not is whether the Company is able to meet its liabilities as and when they accrue due. Whether it is commercially solvent means that the Company should be in a position to meet its liabilities as and when they arise. The Supreme Court in the case of **Pradeshiya Industrial & Investment Corporation of U.P.** v. **North India Petrochemicals Ltd. and another** ((1994) 3 SCC 348) observed that a debt under Section 433(e) must be a determined or a definite sum of money payable immediately or at a future date and the inability to pay the debt should be taken in the commercial sense in that, it is unable to meet current demands. As stated by William James, V.C. it is "plainly and commercially insolvent - that is to say, that its assets are such, and its existing liabilities are such, as to make it reasonably certain - as to make the Court feel satisfied - that the existing and probable assets would be insufficient to meet the existing liabilities. The Apex Court also observed that it is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realizing its debts due from a Company. Referring to **Amalgamated**

Commercial Traders (P) Ltd. v. **A.C.K. Krishnaswami** ((1965) 35 Company Cases 456) the Court observed that it is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the Company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. Finally, the Supreme Court in the said case of **Mediquip Systems (P) Ltd.** v. **Proxima Medical System** (supra) has held that the expression "unable to pay its debts" in Section 433 (e) of the Act should be taken in the commercial sense and that the machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a Company. In **Tata Iron and Steel Co.** v. **Micro Forge(India) Ltd.** (2001 Company Cases 533) a Division Bench of Gujarat High Court observed that it is necessary for the Company Court to consider the financial status, strength and substratum of the Company, in overall context. It is possible, at times, that there may be a cash crunch. It may be also possible, at times, that there is temporary cash crisis despite high sales and heavy turnover and, therefore, in such a situation, mere disability or only on the ground of inability to pay would not constitute a ground empowering the Court to wind up the Company. Therefore, in my view, whether the Company is commercially solvent or not is certainly one

of the considerations which a Company Court is required to take note of before passing any order or an order for its winding up.

20. The petitioner's case proceeds on the assumption that the claim of Rs.19,73,535/- has been admitted by or on behalf of the respondent. Or in other words the Respondent has admitted its liability of a sum of Rs.7,23,890/- due on interest and another sum of Rs.22,50,000/- due as licence fees. However, in my view, the only admitted position in this case is that the respondent has admitted a sum of Rs.2,062/- claimed by the petitioner against the respondent towards City Ledger. If another admission could be culled out is that the Respondent was willing to pay Rs.1,30,428/- as on 15-3-2003 by letter dated 16-3-2003(Exh.J.) with a view to sign a fresh agreement which ultimately did not come about. Apart from that, the case is one of disputed amounts claimed by the Petitioner for which the appropriate remedy is a civil suit. If the petitioner has claimed indebtedness on the part of the respondent in the sum of Rs.19,73,535/-, the respondent has raised a counterclaim in the sum of Rs.5,14,806/- against the petitioner. If the petitioner has deducted a sum of Rs.1,39,090/- towards discount coupons, the respondent has claimed a sum of Rs.1,43,850/- as the sum due and payable to the respondent on that account. In fact, the pleadings of both the parties read in totality show that this petition involves complicated

questions of fact and not only that it is motivated as the petitioner sees the respondent's venture as a competitor to its business and in fact there has been deep differences between the petitioner and the respondent much before the statutory notice was sent to the respondent and probably from the time the Respondent's Casino was shifted from Petitioner's Five Star Hotel to the "Chances" of Respondent's sister concern. Considering the same in my view, this would not be a fit case to entertain a petition for winding up and the appropriate remedy for the Petitioner would be a suit for recovery of money, if at all the Respondent owes any amount to the Petitioner. It may be noted that a Company Court goes by summary procedure and does not deal with evidence in detail which would be required in this case to be led by the petitioner to prove its claim of indebtedness and for this the appropriate remedy is before the Civil Court and not before the Company Court. The Company Court will refuse to exercise its discretion when the petition is motivated and complicated questions of fact are involved. The Apex Court in the case of **M. S. Madhusudan Gordhandas & Co.** v. **Madhu Woolen Industries Pvt. Ltd.** (1971(3) SCC 632) might have observed that if "the exact amount of debt is disputed, the Court will make up the winding up of order without requiring the creditor to quantify the debt precisely" but subsequently the view held by the Madras High Court in **Tube Investments of India Ltd.** v. **Rim and**

Accessories(P) Ltd.((1990) 3 Company L.J. 322) which came to be approved by the Supreme Court in **Mediquip Systems(P) Ltd.** v. **Proxima Medical System**(supra) is that if there is a dispute as regards the payment of the sum towards the principal, however small that sum may be, a petition for winding up is not maintainable and the necessary forum for determination of such a dispute existing between the parties is a Civil Court. In view of the later decision of the Supreme Court in **Mediquip System (P) Ltd**. v. **Proxima Medical System**(supra) the debt under Section 433(e) of the Act must be a determined or of a definite sum of money to be paid immediately or at a future date, and, that is also not the case at hand.

21. There is again a dispute whether the first sum claimed by the petitioner is Rs.7,23,890/- for the respondent at one stage had deducted TDS on the said sum of Rs.1,47,674/- and it is the contention of the petitioner that the TDS certificate was not furnished to the petitioner in time and it is the contention of the respondent, as otherwise can be seen from the annexure to letter dated 16-3-2003(Exh. J) to the petition that only a sum of Rs.5,76,216/- was payable on the said sum of Rs.7,23,890/-. Here again, it is a disputed question which best can be resolved by approaching a Civil Court and not a Company Court. The Respondent by its said letter dated 16-3-2003(Exh. J) had offered to give TDS Certificates but

ultimately who was responsible for not giving the said TDS Certificates in time would be a matter of dispute for which evidence will have to be led. In other words there is a dispute whether the Petitioner is entitled to Rs.7,23,890/- or after deduction of TDS only to Rs.5,76,216/-.

22. The case of the petitioner essentially is based that the liability of Rs.19,17,535/- has been admitted by the respondent and the said liability is essentially in respect of two sums of money, as already stated. The first of Rs.7,23,890/- which is stated is due and payable by the respondent under the agreement dated 1-1-1999 and the second a sum of Rs.22,50,000/- payable by way of license fees as per agreement dated 15-4-2001 from 1-7-2002 to 31-3-2003 at the rate of Rs.2,50,000/- per month. The third claim is of Rs.1,51,673/- which is claimed by way of interest on the aforesaid license fees. There is no dispute as regards Rs.2,062/- incurred by the petitioner on behalf of the respondent towards City Ledger.

23. As regards the indebtedness or liabilities of Rs.7,23,890/- the petitioner has relied upon letter dated 8-7-2002(Exh.D to the petition) written on behalf of the respondent to Shri Ambar Timblo of the petitioner with title "without prejudice" in which it is stated that the correct calculated interest works out to Rs.7,23,890/-. On behalf of the petitioner reliance is

also placed on letter dated 16-3-2003(Exh.J) written by the respondent to the petitioner. The annexure to the said letter shows that a sum of Rs.7,23,890/- was considered and after payment of TDS of Rs.1,47,674/- what was shown outstanding was Rs.5,76,216/-. The petitioner has also referred to form 16-A(Exh.Q1) produced on behalf of the respondent which shows that Income Tax of Rs.73,837/- was paid on a sum of Rs.7,23,890/- for the period from 1-4-2001 to 31-3-2002. In my view, none of the said three documents can be taken to support a contention that the respondent has expressly admitted its liability towards the petitioner in the sum of Rs.7,23,890/-. Firstly, it must be observed that the letter dated 8-7-2002 was written with the title "without prejudice". "Without prejudice" means (1) that the cause or the matter has not been decided on merits, (2) fresh proceedings according to law were not barred. In other words, they mean that what is stated is not final and irrevocable. The Supreme Court(in the case of **Supt.Central Excise** v. **Pratap Rai(1978(3) SCC 113)** referred to Black's Law Dictionary and to Wharton's Law Lexicon. In the former the said expression was defined as where an offer or admission is made "without prejudice" or a motion is denied or a bill in equity dismissed, without prejudice it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as expressly considered or decided, and, in the latter, "the words import and

understanding that if the negotiations failed, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers without prejudice to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment...". It is pointed out on behalf of the respondent that the said letter was written with a view to facilitate the negotiations which were going on at that stage. Apart from the said contention made on behalf of the respondent, in my view, the said letter dated 8-7-2006(Exh.D) per se could not be considered to be an admission of the liability of Rs.7,23,890/- for it was clearly written that it was written without prejudice. Likewise, the annexure to letter dated 16-3-2003 also cannot be taken to be an admission of liability of Rs.7,23,890/- though this figure is indicated therein as an outstanding but what in reality has been shown as an outstanding is Rs.5,76,216/-, after deducting TDS of Rs.1,47,674/- but what is relevant to be noted is that at the foot of the said attachment to letter dated 16-3-2003 what is stated is that the net payable to the petitioner was Rs.1,30,428/- and if at all, the said letter dated 16-3-2003 is indicative of any admission it is as regards the liability of the respondent in the sum of Rs.1,30,428/-. The certificate in form 16-A(Exh.Q1) only shows that the said sum was due to the petitioner on which a sum of Rs.73,837/- was paid as Income Tax but it cannot be read independently of the letter dated 16-3-2003 where the liability

admitted is not of Rs.7,23,890/- but only of Rs.1,30,428/-. Even assuming for a moment that there is an admission of indebtedness in favour of the petitioner in the sum of Rs.7,23,890/-, the respondent has been able to prima facie demonstrate that there is a liability of the Petitioner towards the respondent of Rs.8,78,075/-. The respondent has alleged that Ls.8,650/- corresponding to Rs.6,53,075/- was paid by the Managing Director of the respondent to Shri Auduth Timblo for and on behalf of the petitioner-Company to be adjusted in the financial dealings between both the Companies. In fact, there is no serious denial as regards the said receipt of money in foreign currency by or on behalf of the petitioner. In fact, Shri Auduth Timblo has not even cared to file an affidavit denying the said claim of the Managing Director of the respondent and, therefore, we could prima facie conclude that the said amount was paid on behalf of the respondent by its Managing Director to Shri Auduth Timblo on behalf of the petitioner. Some of the receipts produced show that the said payments were made in the name of "Chances". The only contention raised on behalf of the petitioner is that the said dues are not qua de petitioner but qua Shri Audhut Timblo and the respondent would be free to recover the same from him. I have no hesitation to conclude that the said payment of Ls.8650 corresponding to Rs.6,53,075/- were made by the Respondent's Managing Director, as stated by him, to the petitioner's Director Shri Audhut Timblo

for and on behalf of the petitioner to be adjusted towards the dues payable by the respondent and that being the position the respondent is certainly entitled to contend that the said sum of Rs.6,53,075/- should be first adjusted from the dues payable to the Petitioner. There is no dispute that a sum of Rs.2,25,000/- was due and payable by the petitioner to the sister concern of the respondent at the rate of Rs.50,000/- being the compensation payable for the period from 12-7-2002 to 15-11-2002. The respondent is certainly entitled to seek adjustment towards the sum payable to its sister concern. The letter dated 21-4-2003(Exh.F) written by the petitioner to the respondent shows that indeed a deduction of Rs.3,55,500/- payable to the sister concern M/s. Britto Amusements Pvt. Ltd. was made by the petitioner and that was because the accounts between the petitioner, the respondent and the respondent's sister concern M/s. Britto Amusements Pvt. Ltd. were settled by adjustments. After all, the said Dr. William Britto was the Managing Director of the respondent as well as its sister concern namely the said M/s. Britto Amusements Pvt. Ltd. and if in the past the accounts were settled in that manner by making adjustments there is every reason for the respondent to insist that the amount due to its sister concern be adjusted first before the remainder liability towards the petitioner is paid by the respondent. In other words, as against the liability of Rs.7,23,890/- the respondent has a bona fide dispute against the petitioner in the sum of

Rs. 8,78,075/-.

24. As regards indebtedness of Rs.22,50,000/- for the period from 1-7-2002 to 31-3-2003 at the rate of Rs.2,50,000/- per month the petitioner has again relied on the annexure to letter dated 16-3-2003(Exh.J) wherein license fees from 1-7-2002 to 15-11-2002 have been shown in the sum of Rs.11,25,000/- and again on form 16-A wherein a sum of Rs.18,75,000/- for the period from April, 2002 to 15th November, 2002 was shown as credited, though not actually credited and Income Tax of Rs.3,93,750/- was paid. On behalf of the petitioner, it is explained that the said amount of Rs.18,75,000/- includes license fees paid from 1-4-2002 for a period of three months at the rate of Rs.2,20,000/- and also the license fees not paid to the petitioner, though shown as paid from 1-7-2002 till 15-11-2002 which works out to Rs.11,25,000/-. I have already observed that the said annexure to letter dated 16-3-2003 at the most can be shown as an admission of liability to the extent of Rs.1,30,428/- as shown at the foot of the statement. Even otherwise, there is no reason why the respondent should pay compensation to the petitioner at the rate of Rs.2,50,000/- after 15-11-2002 on which date admittedly the agreement between the parties came to an end. The Petitioner's contention that the said agreement dated 15-4-2001, which admittedly continued till 15-11-2002(as per Exh.B2)

continued with the permission of the Petitioner till 31-3-2003. The Petitioner might have as well contended that the said agreement continues even today with his permission. Prima facie what would be payable to the Petitioner under the said agreement is Rs.11,25,000/- from 1-7-2002 to 15-11-2002 which is also reflected in the Petitioner's letter dated 12-12-2002 produced by the Respondent as well as on annexure to Respondent's letter dated 16-3-2003. That the Respondent discounted coupons from 12-10-2002 to 15-3-2003 does not necessarily follow, unless parties lead evidence in that regard, that the agreement dated 15-4-2001 continued till then, in the absence of any express agreement or arrangement after 15-11-2002. In any event, it must be stated that the said claim of the petitioner whether in the sum of Rs.22,50,000/- along with interest of Rs.1,51,673/- or Rs.11,25,000/- as mentioned by the Respondent on annexure to letter dated 16-3-2003 or by the Petitioner on letter dated 12-10-2002(at page 236) is in a serious dispute before the Civil Court in a suit filed by the respondent wherein the respondent has also claimed from the petitioner a sum of Rs.17,27,954/- and the learned Civil Judge, Senior Division by his Order dated 31-7-2004 has come to the conclusion that the agreement dated 15-4-2001, under which the said amount of Rs.22,50,000/- is claimed is voidable on account of duress, coercion etc. and this Court in its Order dated 23-6-2005 in Appeal From Order

No.59/2004 has affirmed the said finding by stating that the proximity between the dates of the police raid and the date of the second agreement superseding the agreement would indicate prima facie the respondent Club had come under pressure and, therefore, agreed to sign the agreement of 15-4-2001. On behalf of the petitioner it is contended that the findings given by Civil Judge, Sr.Division or by this Court are only prima facie findings which are not binding on this Company Court. This submission in my view, cannot be accepted. This Court does not conclusively adjudicate the claims of the parties but investigates summarily whether the dispute as regards indebtedness is bona fide or not. The very fact that the respondent has been able to obtain a prima facie finding shows that the Respondent is entitled to succeed. The execution of the agreement dated 15-4-2001 has been prima facie held to be voidable and as against the Petitioner's claim of Rs.11,25,000/- under the said agreement, the Respondent has already deposited as on date Rs.20,60,327/-. Therefore, on this aspect there are 2 options before the Court: either to keep this petition pending till the suit is decided or dismiss the petition as the dispute raised by the Respondent is bona fide. Considering the totality of the facts of the case, including that the accounts between both the parties were never settled, and were always disputed I propose to choose the second option. The case at hand is not based on any virtual admitted liability as contended. If there was any

admission at all it is only as regards Rs.1,30,428/- as shown at the foot of the account on annexure to letter dated 16-3-2003(Exh.J) and this was conveyed to the Petitioner even before the statutory notice was sent, though the same at relevant time did not include the payments made in foreign currency to the Petitioner's Managing Director and that was possibly with a view to facilitate execution of another agreement after 15-11-2002. In my view, the respondent has raised a bona fide dispute as regards the claims of indebtedness raised by the petitioner. By no stretch of imagination it can be said that the defence taken by the Respondent has been manufactured or is not substantial or is moon shine. I have already stated that the petition arises from deep business differences between the petitioner and the respondent and is otherwise motivated and being so this would be a fit case to dismiss the same by imposing costs which are fixed at Rs.10,000/-. It may be reiterated that it is a well settled principle that a winding up petition is not a legitimate means of seeking to enforce payment of debts which is bona fide disputed by a Company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under the circumstances may be stigmatized as scandalous abuse of the process of the Court. This is precisely the case at hand. The respondent has raised substantial grounds in disputing the claim made by the petitioner and, therefore, there has been no neglect on the part of the respondent to

satisfy the claims made by the petitioner and, therefore, there is no neglect to pay within the the meaning of Section 433(a) of the Act and since there is no neglect the deeming provision does not come into play and the ground of winding up that the Company is unable to pay its debt is, therefore, not substantiated in this petition. On the contrary, the Petitioner inspite of knowing the Respondent's stand that the Respondent was not willing to pay anything more than Rs.1,30,428/- vide letter dated 16-3-2003 chose to file this petition rather than a suit for accounts or recovery of money shows that the petition is an abuse of the process of the Court. Accordingly, the petition is hereby dismissed with costs as aforesaid.

N. A. BRITTO, J.

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